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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 237

JEWEL G. BEREND,
Petitioner,

v.

J. F. PRITCHARD & CO.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Memorandum Opinion of the U.S. District Court for the Northern District of Texas (Fort Worth Division) and the *per curiam* opinion of the U.S. Court of Appeals for the Fifth Circuit, 422 F.2d 1247, are reproduced in the appendix to the petition for writ of certiorari (Petn. 1a-11a).

JURISDICTION

The *per curiam* opinion of the U.S. Court of Appeals for the Fifth Circuit was entered on March 9, 1970. The petition for writ of certiorari was filed by petitioner in this Court on June 5, 1970. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the wrongful-discharge type claims of petitioner, respondent's employee operating as a subcontractor in constructing cooling towers and equipment for industrial plants built by respondent, were properly dismissed by the district court as barred by the Texas statutes of limitations and, upon the court of appeals' affirmance, for the additional reason that petitioner failed to allege a cause of action.

STATUTES INVOLVED

The pertinent parts of the Texas statutes of limitations, Articles 5526 and 5527, Vernon's Annotated Texas Civil Statutes, are set forth in the *per curiam* opinion of the Court of Appeals below and appear in the appendix to the petition for certiorari (Petn. 11a-12a).

STATEMENT

With its main office in Kansas City, Missouri (T. 44), respondent J. F. Pritchard & Co. designs, engineers and constructs plants and equipment for chemical, petroleum, gas, power and other heavy industries (T. 7, 10), with operations in California (T. 77), Texas (T. 83) and elsewhere in the United States, Canada and abroad (T. 76; Petn. 1a). For some years prior to 1954, petitioner Jewel G. Berend, respondent's employee who headquartered in Ft. Worth,

Texas (T. 4-5), handled as a subcontractor the construction of cooling towers and equipment in such industrial plants (T. 22, 76-77; Petn. 1a).[1]

In 1954 when he stated he was disabled and unable to do physical work any more (T. 53, 55-56, 78), petitioner came to Kansas City to discuss his Fort Worth operations with Mr. John F. Pritchard, Sr., respondent's president (T. 58-61; Petn. 2a). Petitioner stayed with his wife at the Continental Hotel on January 8 and 9, 1954 (T. 55-61, 118) and attempted unsuccessfully to contact and meet with Mr. Pritchard (T. 60-61, Petn. 2a). Respondent's Mr. Carl Johnson did come to petitioner's hotel room on January 8 (T. 60; Petn. 2a-3a), and the next day delivered a letter to petitioner dated January 9, 1954 (T. 61).

Among other things, Mr. Johnson's letter stated that "I have discussed your proposed agreement with Mr. Pritchard and Mr. Lyon [then respondent's secretary-treasurer]"; that "while we will be glad to have you figure any erection work we might require, we cannot consider your proposition as our sole means of cooling tower erection" but "must continue with our own erection department"; that in view of your decision "to leave the Company and enter business for yourself," your resignation should "become effective the first of the month following substantial completion of all jobs now under construction as set forth in paragraph 3 of your letter of December 31, 1953 . . ."; and that "Your present bonus arrangement with the company will remain in effect on all jobs now under construction . . . ."[2] There followed various requests and instruc-

1. The Transcript filed in this Court is believed to have pages in the same order (although non-chronological) as the Appendix in the U.S. Court of Appeals below which is cited "T." Petitioner's certiorari petition is cited "Petn."

2. As to the "bonus arrangement," at the district court hearing on respondent's motion to dismiss, petitioner stated that under his arrangement with respondent "we would split the profit fifty-fifty" on the cooling equipment he constructed "the same as a subcontractor" for respondent (T. 74-75).

tions regarding the turning over of work and the handling of personnel, including the statement that "In view of your resignation, the erection department will be moved back to Kansas City." The letter closed with Mr. Johnson's comment that "You have done an excellent job of directing our cooling tower erection, and, while I am sorry to see you leave, I want to wish you much success in your new undertaking." (T. 64-66; Petn. 4a-6a.)

Petitioner checked out of the Continental Hotel, returned to Fort Worth and thereafter received a letter from Mr. Pritchard dated January 21, 1954 in which he stated that "I regret very much that we could not get together on any mutually suitable basis"; that "I am sorry to hear that you are leaving to follow your personal plans"; that "if there is nothing that can be worked out, I do not see any possible procedure except to settle for past services on the basis of our existing agreement and procedure"; that "It may be a little while before we have an idea of what this will amount to, but I can assure you that in figuring this out our inclination would be to be as reasonable as possible in view of your long and satisfactory services with our company"; and that "Just as soon as we have a definite idea of what this will be shaping up to, we will let you know further . . . " (T. 68-69; Petn. 7a-8a.)

Petitioner thereafter turned his operations over to respondent "because, in the first place, due to my health . . . . And since that time I was the same as bedfast for about three years getting over the ulcers, then due to that trouble and my back and my leg . . . , I haven't done any active work at all." (T. 70). In his statements at the District Court's hearing on respondent's motion to dismiss, petitioner also said that respondent would not negotiate further, would not answer petitioner's letters and did not pay what he considered was owed him (T. 32, 80; Petn.

8a). Almost thirteen years after his trip to Kansas City and termination of his subcontract work, petitioner received respondent's letter dated October 13, 1966 advising that "the Company has no responsibility in connection with any of the matters referred to in your correspondence . . . ." (T. 10, 32-33, 80, 155; Petn. 8a.)

Without the aid of counsel, petitioner filed two suits against respondent and others in the U.S. District Court for the Northern District of Texas (Fort Worth Division) (T. 2-11, 87-97). In the one filed May 29, 1969, petitioner claimed $96,822.25 plus interest from 1954, a total of $256,822.25 (T. 2; Petn. 1a). In the second filed July 1, 1969, where he also joined respondent's former affiliate, J. F. Pritchard & Company of California, and the Continental Hotel, petitioner claimed $100,000,000.00 (T. 87; Petn. 1a-2a). Responsive motions to dismiss were filed (T. 12-20, 98-115). Both suits involved the same transaction and accordingly were consolidated (T. 38-39; Petn. 4a).

The district court observed that "there was some difficulty in understanding from the written instruments just what the plaintiff's cause of action was" (T. 23; Petn. 2a), and "held a full and complete hearing to determine the nature of the plaintiff's claims and complaints . . ." at the time the motions to dismiss were argued (T. 26; Petn. 4a). The so-called "Continental Hotel affair" was the gravamen of petitioner's complaint (T. 23, 53-55; Petn. 2a), the district court stating—as petitioner himself orally asserted (T. 62-63, 70-71)—that petitioner's "theory" is that the January 9, 1954 letter delivered to him at his Kansas City hotel room "operated to steal his Fort Worth, Texas operations and deprive him of his long standing subcontract arrangement with J. F. Pritchard & Company, caus-

ing him to suffer the damage for which he sued in these two cases" (T. 30; Petn. 6a).[3]

At the conclusion of the hearing, the district court sustained respondent's motion to dismiss (T. 12-14) (the Continental Hotel having earlier been dismissed (T. 50-51)) and said that any cause of action was barred by the two-year and four-year Texas statutes of limitations. In its Memorandum Opinion subsequently filed (T. 21-35; Petn. 1a-10a), the district court stated that "these cases could be dismissed for failure to state a claim on which relief could be granted, as there is no indication that J. F. Pritchard & Company was under any legal obligation to continue to subcontract any of its construction business to plaintiff"; and that "even if plaintiff had a cause of action, it is barred by the Texas statutes of limitations." (T. 34; Petn. 9a.)

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed *per curiam*, holding as follows:

> "The nature of this cause is somewhat obscure, but it appears to be one in tort for conversion of property or possibly breach of contract. The complaint here contains no allegation of fact showing any legal right which belonged to complainant and which the appellees breached, with damages result-

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3. The colloquy between the district court and petitioner included the following:

> "THE COURT: What is the—is the whole suit based—is your whole suit against Pritchard and his corporations based on what you call the Continental Hotel room affair?
>
> MR. BEREND: Yes, it really is.
>
> THE COURT: All right, it goes back—it depends—
>
> MR. BEREND: —It all goes back, because I went—they asked me to come to Kansas City, Missouri, to negotiate the Fort Worth, Texas operation.
>
> THE COURT: And that is when you say they took advantage of your and violated your rights?.
>
> MR. BEREND: Yes, sir. . . ." (T. 55.)

ing therefrom. Under the most liberal interpretation of the Federal Rules of Civil Procedure, the appellant failed to allege a cause of action against appellees. *Dorsey* v. *State Farm Insurance Co.*, 5 Cir., 1961, 294 F.2d 678.

However, assuming a cause of action once existed and was alleged, the complainant waited fifteen years—from 1954 to 1969—to bring his action, and Texas Statutes of Limitations, Article 5526 and Article 5527, Vernon's Annotated Texas Civil Statutes, would prevent recovery.

The District Court did not err in dismissing the actions." (Petn. 10a-11a.)

REASONS FOR DENYING THE WRIT

1. The decision below is not appropriate for review by this Court.

As readily revealed by even a cursory reading of the district court's Memorandum Opinion (Petn. 1a-10a), petitioner's brief and the Statement herein, this case involves special and unique facts and a determination under State statutes of limitations. There is no question of general importance or broad impact, no Constitutional or federal statute involved and no conflict among the decisions to be resolved. Clearly, this case is not one for review by this Court.

2. The decisions of the District Court and Court of Appeals are correct.

After trying to ferret out the basis of petitioner's exorbitant claims at the hearing on respondent's motion to dismiss,[4] the district court gave petitioner an opportunity to

4. Even petitioner's own certiorari petition alludes to "the almost incomprehensible pleadings of the Plaintiff . . . ." (Petn. 10-11).

be fully heard and to present anything he desired.[5] The trial judge then commented that "if I ever saw a case which was barred by the statutes of limitations, it is these two" (T. 84). And in its Memorandum Opinion, the court stated that while "these cases could be dismissed for failure to state a claim on which relief could be granted, . . . even if plaintiff had a cause of action, it is barred by the Texas statutes of limitations." (T. 34; Petn. 9a.)

Similarly, in a concise *per curiam* opinion which understandably was entered after concluding "that this case is of such character as not to justify oral argument" (Petn. 10a), the Court of Appeals for the Fifth Circuit divined the "somewhat obscure" nature of petitioner's cause as "appear[ing] to be one in tort for conversion of property or possibly breach of contract" (Petn. 11a). The court below then quickly concluded that "Under the most liberal interpretation of the Federal Rules of Civil Procedure, the appellant failed to allege a cause of action" and that even "assuming a cause of action once existed and was alleged, the complainant waited fifteen years—from 1954 to 1969—to bring his action, and the Texas Statutes of Limitations . . . would prevent recovery." (Petn. 11a.)

Petitioner urges (Petn. 7-8) that the statutes of limitations were erroneously applied by the courts below and that a 1968 Texas case, *Naylor* v. *Gutteridge*, 430 S.W.2d 726 (Texas Civ. App. 1968) was ignored. That case involved a suit by an incompetent's guardians for monies she

5. After beginning with the statement "Mr. Berend, tell me what your case is about" (T. 51), the district court judge questioned the petitioner at length (T. 51-83) and concluded by asking whether there was "Anything else you would like to say?" (T. 83). Compare, *e.g.*, *Roberts* v. *Peppersack*, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967), and *Beckett* v. *Kearney*, 247 F. Supp. 219 (N.D. Ga. 1965), cited by petitioner (Petn. 10), which are largely inapposite here because they involved unlearned and confined inmates of penal institutions.

loaned to defendants who claimed repayment of some loans made in 1964 and raised the statute of limitations as to the claims for loans made prior to 1964. As to a particular $2,500.00 check dated October 20, 1964, although defendants had not pleaded the statute and had admitted the debt, the court commented that even if the Texas two-year statute of limitations on oral contracts had been sufficiently pleaded as a defense, the statute was tolled upon the April 26, 1966 adjudication of the ward's incompetency under an applicable tolling statute. It is true that the court, by way of *dictum,* additionally commented that there was "no cause of action until it became clear that defendant Naylor did not intend to honor the terms of his letter" dated October 8, 1964 which, in asking for the loan, promised increased monthly payments beginning "in a couple of months." *Id.* at 734. But suit was filed on December 6, 1966, approximately two years and seven weeks after the loan by check was made, and the court said that "It is reasonable to presume, in view of Naylor's promise . . . , that the obligation was carried past December of 1964, which would take it out of the two-year statute." *Ibid.*

The instant situation involving petitioner's belated suits is clearly distinguishable as he waited over fifteen years between the 1954 date of "the Continental Hotel affair" with its related correspondence and the filing of his suits in 1969. Certainly it is not reasonable here, solely because of respondent's "we will let you know further" letter of January 21, 1954 (see Statement herein, *supra,* at p. 4), to presume that any obligation of respondent carried on for fifteen years to the time petitioner filed suit.

It should be emphasized that there is no evidence in the record to support petitioner's assertions (Petn. 3, 5) that

he had "written contracts" with respondent. There was, of course, certain correspondence between the parties, but there is nothing to show that there was any written agreement between them regarding petitioner's rather unique employment under which he operated like a subcontractor. Accordingly, it is the Texas two-year statute of limitations which is really applicable here, Article 5526, Vernon's Texas Civil Statutes, not the four-year statute, Article 5527, which relates to "Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing" (Petn. 12a).[6]

Furthermore, it makes no difference whether petitioner's obscure cause of action is, as the court of appeals put it, apparently "one in tort for conversion of property or possibly breach of contract" (Petn. 11a). In any event the two-year statute is applicable, respondent submits, because after two years Article 5526 bars not only "Actions for debt where the indebtedness is not evidenced by a contract in writing," Article 5526, para. 4, but also "Actions of trespass for injury done to the estate or the property of another," "Actions for detaining the personal property of another, and for converting such property to one's own use," and "Actions for taking or carrying away the goods and chattels of another," Article 5526, at paras. 1, 2 and 3 (Petn. 11a). In short, if petitioner stated any cause of action at

6. Petitioner apparently endeavors to raise such a written contract by including in the appendix to his certiorari petition certain interoffice communications of respondent regarding its "arrangement" with petitioner and a conference with him at which certain things were "discussed and agreed upon." (Petn. 13a-15a). These memoranda are not in the transcript before this Court, and if petitioner is going outside the record in an effort to construct some sort of "written contract," he should likewise acknowledge—what also is admittedly not in the transcript—that on September 10, 1954, approximately eight months after "the Continental Hotel affair" and ensuing correspondence, respondent issued its check No. 132254 to petitioner in the amount of $4,000.00 which was endorsed "In full settlement of any and all claims which J. F. Pritchard and Company may have on J. G. Berend or Berend on Pritchard," signed by both parties and paid.

all, which respondent denies consistent with the holdings below, he at best "almost incomprehensibl[y]" pleaded an action coming within some proscribed part of the foregoing two-year statute.

Nor is petitioner's reliance upon respondent's October 13, 1966 letter (see Statement herein, *supra,* at p. 5), of any real avail to him. This was the one, almost thirteen years after "the Hotel Continental affair" and related correspondence, in which respondent told petitioner that "the Company has no responsibility in connection with any of [petitioner's] matters" and "is closing its file," and with which petitioner tries unconvincingly to link up respondent's January 21, 1954 letter stating that "just as soon as we have a definite idea of what this will be shaping up to, we will let you know further" (Petn. 8a, and see Statement herein, *supra,* at p. 4.) Tenuously tying together these two communications of almost thirteen years apart, petitioner astonishingly argues that he "did not have a cause of action for breach of contract until the respondent made it clear that it would not pay him for past services" (Petn. 8).

Clearly, at the time petitioner came to Kansas City and immediately thereafter, respondent made its position known to petitioner by way of written communications to him. This was in January of 1954. It is not only inconsistent but wholly unpersuasive for petitioner to now urge that, during the almost thirteen years until he received the 1966 letter, he "reasonably relied" upon respondent paying him, in view of respondent's total failure—petitioner said below (T. 32, 80; Petn. 8a)—to negotiate further or answer petitioner's letters. In any event, quite importantly, more than a two-year period elapsed between respondent's October 13, 1966 letter (at which time, even under petitioner's unconvincing view, his cause of action accrued) and the

May 29, 1969 filing of petitioner's first suit. Under the two-year limitation of Article 5526, accordingly, petitioner's actions were clearly barred by the Texas statute of limitations.

Petitioner also asserts that "Missouri law might also be applicable to the Plaintiff's claim" and alludes to Section 516.110 of the 1959 Missouri Revised Statutes, the ten-year limitations statute for actions on written contracts. (Petn. 9.) As already indicated, however, despite petitioner's bare references thereto, there is nothing in the record to support a "written contract" between the parties. At most under a Missouri contract approach, therefore, Section 516.120(1) of the Missouri Statutes would be applicable, as this prohibits actions upon oral contracts after five years.

As to petitioner's asserted reliance upon expecting to be paid until he received respondent's 1966 letter, it is well established in Missouri that if petitioner had any contractual cause of action, it accrued—at the latest—within a reasonable time after the "Hotel Continental affair" and related correspondence, and certainly was long barred even five years before petitioner filed suit in 1969. *E.g., Bisesi* v. *Farm & Home Savings & Loan Ass'n of Missouri,* 78 S.W.2d 871, 874 (St.L. Ct. of App. 1935) ("In the case before us no definite time was set for the delivery of the certificate to plaintiff by defendant, and in this situation it is ordinarily presumed that a reasonable time is intended, and limitation begins to run after such reasonable time.").

As far as any tort claim under Missouri law is concerned, Missouri's Section 516.120 also sets forth a five-year limitation for trespass and conversion actions, and thus any such cause based upon the 1954 "Continental Hotel affair" and related correspondence which allegedly

"operated to steal [petitioner's] Fort Worth, Texas operations" (T. 30; Petn. 6a) was likewise long barred by 1969. *E.g., Chemical Workers Basic Union* v. *Arnold Savings Bank*, 411 S.W.2d 159, 163 (Mo. Sup. Ct. 1966) ("Clearly, in this case, plaintiff's action is not 'upon any writing * * * for the payment of money' but for conversion and the five-year statute of limitations applies. . . . . Since this action was barred by the five-year statute of limitations, the court should have directed a verdict for defendant . . . ."). This case also emphasizes the need to exercise "reasonable diligence" to take action within the period of limitations *Id.* 165. Interestingly, this case is cited by petitioner in his brief (Petn. 9).

Furthermore, and quite important to possible application of Missouri statutes there is the fact that Texas does not have a so-called borrowing statute; thus, where a cause of action arises in another state whose statute of limitations exceeds that of Texas and the suit is brought in Texas, the statute of limitations of Texas governs and will be applied. *Hobbs* v. *Hajecate*, 374 S.W.2d 351 (Texas Civ. App. 1964). In Texas, statutes of limitations are viewed as matters of procedural rather than substantive law, and the limiting statute of the forum prevails. *Evers* v. *Powell*, 238 F. Supp. 787, 788 (S.D. Texas, 1964), aff'd., 342 F.2d 46 (5th Cir. 1965).

The district court sat in this diversity case as another Texas court and was required to decide it in the same manner as would a Texas court. *Evers* v. *Powell, supra.* Under Texas law its own statutes of limitation would apply, rather than those of Missouri. As petitioner sued in Texas, that state was the forum, and the district court correctly applied the forum statutes in determining that petitioner failed to bring his actions within the allowable Texas limitation period. The court of appeals correctly affirmed by applying the Texas statutes

CONCLUSION

In conclusion, it is worth pointing out what the district court stated at the the outset of its Memorandum Opinion:

> "This is another one of those pitiful cases where a man has become obsessed with the idea that he has been persecuted, and is giving vent to his feelings by busying himself with litigation which he thinks will afford relief for such persecution." (Petn. 1a.)

It is time for such litigation to come to an end.

For the reasons stated, the petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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